STATE OF MICHIGAN

IN THE SUPREME COURT

MARK JAMES,

Plaintiff-Appellee,

and

AUTO-OWNERS INSURANCE COMPANY,

Intervening Plaintiff/Appellee,

vs

AUTO LAB DIAGNOSTICS & TUNE UP CENTERS and FARMERS INSURANCE EXCHANGE,

Defendants-Appellants,

and

SECOND INJURY FUND/PERMANENT & TOTAL PROVISIONS,

Defendant-Appellee.
_____/

Supreme Court: 128355

Court of Appeals: 257993

Lower Court: WCAC Docket No: 040002

128355
Suppl

DEFENDANTS AUTO LAB DIAGNOSTICS AND FARMERS INSURANCE EXCHANGE'S SUPPLEMENTAL BRIEF

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STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction over this matter, pursuant to MCR 7.301(A)(2) and MCL 418.861a(14).

STATEMENT OF QUESTIONS PRESENTED

I

IF BUSH V PARMENTER, FORSYTHE, RUDE & DETHMERS REMAINS VALID LAW, HAS IT BEEN MISINTERPRETED BY THE WCAC AND PLAINTIFF?

Defendants-Appellants answer "YES."
The WCAC answered "No."
The Court of Appeals did not answer.

III

DOES THE STATUTE IMPOSE NO REQUIREMENT UPON AN EMPLOYER OR WORKERS' COMPENSATION CARRIER TO PAY AN ATTORNEY FEE ON UNPAID MEDICAL EXPENSES?

Defendants-Appellants answer "YES."
The WCAC answered "No."
The Court of Appeals did not answer.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendants seek leave to appeal from the August 20, 2004 opinion of the WCAC, towards the end of the reversal of that opinion and the denial of benefits or, at the least, the reversal of the granting of an attorney fee on plaintiff's medical expenses. Alternatively, defendants seek an order peremptorily granting such relief.

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Supreme Court: 128355

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Lower Court: WCAC Docket No: 040002

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(The transcript of the proceedings below shall be referred to as follows:

"I"	May 19, 2003
"II"	June 6, 2003
"III"	June 16, 2003
"IV"	October 22, 2003

Numbers preceded by "B" refer to pages of the deposition of Brian Booher.)

Defendants-Appellants Auto Lab Diagnostics & Tune Up Centers and Farmers Insurance Exchange adopt the Statement of Material Facts and Proceedings contained in the application for leave to appeal they previously filed.

In an order dated October 14, 2005, this Court directed its Clerk to schedule oral argument on defendant's application, and further provided an opportunity for the parties to file supplemental briefs. Defendant now submits this brief accordingly.

ARGUMENT I

IF BUSH V PARMENTER, FORSYTHE, RUDE & DETHMERS REMAINS VALID LAW, IT HAS BEEN MISINTERPRETED BY THE WCAC AND PLAINTIFF.

Standard of Review. This Court reviews findings of fact rendered by the WCAC solely to determine whether they are supported by any evidence in the record, but may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. Const 1963, Art VI, §28; MCL 418.861a(14); Mudel v Great Atlantic & Pacific Tea Co, 462 Mich 691; 614 NW2d 607 (2000); DiBenedetto v West Shore Hospital, 641 Mich 394; 605 NW2d 300 (2000); Oxley v Dep't of Military Affairs, 460 Mich 536; 597 NW2d 89 (1999).

In its decision below, the WCAC granted benefits based upon this Court's decision in Bush v Parmenter, Forsythe, Rude & Dethmers, 413 Mich 444; 320 NW2d 858 (1982), in the process ignoring the Court's subsequent opinion in Camburn v Northwest School District, 459 Mich 471; 592 NW2d 46 (1999). In response to defendant's application for leave to appeal to this Court, both plaintiff and intervening plaintiff also strongly relied upon Bush. However, if Bush remains viable at all, it should be carefully read, as it does not favor the result reached below.

With regard to that viability, defendant would note that Bush was followed some years later by Camburn, which obviously covered some of the same ground. To the extent that Bush is inconsistent with Camburn, the most recent decision should control. Furthermore, there is some question if Bush remains viable, in light of the passage of MCL 418.301(3), excluding from compensability "an injury incurred in the pursuit of an activity the major purpose of which is social or recreational..." In that regard, it should be recalled

that Bush involved an injury during the employee's deviation from purportedly employment-related activities.

In any event, Bush should be read carefully, as it actually imposes essentially the same test as does Camburn, putting the emphasis on employer direction. In discussing the facts, the Bush Court emphasized the fact that the employer directed the employee to undertake the "special mission" that culminated in an injury:

> "Defendant law firm encouraged its specialists to attend such seminars and paid for all of the expenses incurred. Defendant received a special benefit from the attendance by its attorneys at these seminars: a work force which was informed of the most recent changes in their specialty and kept up to date on the legal service provided by banks, as well as advertising of the firm's competence and interest in the specialty. By encouraging its attorneys to attend these employment-related, educational seminars, defendant was in effect sending Bush on a special mission." Bush, supra, at 451-452 (emphasis supplied).

While a benefit to the employer was discussed, it was obviously the fact that the employer sent the employee to the seminar that made it a special mission.

When further discussing the "special mission," the Bush Court went on to effectively impose the very same two-pronged test later noted by the Camburn Court:

> "Although the general rule of law is that injuries sustained by employees going to and coming from work are not compensable, *Thomas v Certified Refrigeration Inc*, 392 Mich 623, 631, fn 3; 221 NW2d 378 (1974); *Dent v Ford Motor Co*, 275 Mich. 39, 41-42; 265 NW 518 (1936); *Hills v Blair*, 182 Mich 20, 26; 148 NW 243 (1914), 'this is not the ordinary case of an employee going to and from his work but one where the employee was engaged in a *special mission* in the interest of and at the direction of his employer', *LeVasseur, supra*, 338 Mich 123; 61 NW2d 93 (emphasis [italics] added [by the Court]). Travel to and from the special mission is in the course of employment and would normally come within the protection of the Worker's Disability Compensation Act." Bush, supra, at 451-452 (underlined emphasis supplied).

As this language makes clear, Bush was considered a special mission case, and what made his trip a special mission was that it was undertaken both "in the interest of" **and** "at the direction of" the employer. These are the very same elements defendant contends

were imposed by Camburn, both of which must be satisfied before a trip can be deemed work-related.

That this is so is plain from the following language from the Camburn Court, which demonstrates that a benefit to the employer is not sufficient, without accompanying employer direction, to create a special mission:

> "We agree with the WCAC that the magistrate properly applied the law to the facts as found. Even if defendant was directly benefited by plaintiff's intent to attend the seminar, substantial evidence supports the magistrate's conclusion that attendance was neither compulsory nor definitely urged or expected. Instead, it was merely encouraged, and, as such, was not an incident of employment. Therefore, plaintiff's injury did not arise out of and in the course of her employment." Camburn, supra, at 477-478.

This language could not be clearer.

Intervening plaintiff has argued that this language is dicta, noting that the magistrate and WCAC in Camburn had held that the claimant had established neither a direct benefit to her employer nor that she was required, expected, or urged to attend the seminar. It is not clear what intervening plaintiff is attempting to accomplish with this argument. Is it contending that Camburn is meaningless and need not be followed or considered at all? Or is it arguing that, since neither prong was satisfied, it may pick the one that is controlling and ignore the other one?

In point of fact, in his concurrence in Camburn, Justice Cavanagh noted that the entire discussion of special missions in Bush was dicta, because the decision in that matter turned on the employee's deviation from any allegedly employment-related activities:

> "Auto Club relies on *Bush v Parmenter, supra*, for the proposition that employer encouragement to attend a work-related seminar transforms an ordinary journey into a 'special mission.' This reliance is misplaced. In *Bush*, an attorney traveled forty miles to attend a probate seminar in another city. *Id* at 446; 320 NW2d 858. After the seminar, he went bar hopping and then to a late night dinner before he began his journey home. *Id* at 447-448; 320 NW2d 858. The attorney was shot and killed while en route home. *Id* at 448; 320 NW2d 858. The sole issue in Bush was whether the

> attorney's deviation was so extensive that the business character of the trip was dissolved. Id at 450; 320 NW2d 858. It was uncontested that the attorney was on a special mission. The opinion discussed the special mission in dicta as a prelude to the discussion of the issue. *Id.* Thus, Auto Club cannot rely on *Bush* as a rule of law regarding the special mission exception. Furthermore, the instant case is distinguishable on its facts. In *Bush*, a partner in the firm testified that every attorney in the firm was expected to attend continuing legal education seminars and that it was the practice of the firm to pay for the entire expense involved, including furnishing a car. *Id* at 450-451, n 5; 320 NW2d 858. In this case, no such distinguishing circumstances were found to exist by the magistrate." Camburn, supra, at 484-485, dissent of Cavanagh, J.

This analysis undercuts the plaintiffs' argument in this case in every respect. If anything is dicta, it is the language from Bush upon which the WCAC relied. Furthermore, the issue of employer direction or expectation was simply not present in this case.

Clearly, Bush does not support the result reached below. That result was legally erroneous, and should be reversed.

ARGUMENT II

THE STATUTE DOES NOT REQUIRE THAT AN EMPLOYER OR WORKERS' COMPENSATION CARRIER PAY PLAINTIFF'S COUNSEL AN ATTORNEY FEE ON UNPAID MEDICAL EXPENSES.

Standard of Review. This Court reviews findings of fact rendered by the WCAC to determine whether they are supported by any evidence in the record, but may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. Const 1963, Art VI, §28; MCL 418.861a(14); Mudel v Great Atlantic & Pacific Tea Co, 462 Mich 691; 614 NW2d 607 (2000); DiBenedetto v West Shore Hospital, 641 Mich 394; 605 NW2d 300 (2000); Oxley v Dep't of Military Affairs, 460 Mich 536; 597 NW2d 89 (1999).

If this Court believes benefits are payable in this case, it should at the least reverse the WCAC's order directing defendant to pay plaintiff's attorney a fee on unpaid medical expenses. That order was predicated upon the following language from MCL 418.315(1):

> "If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee paid by the employee."

The language of this provision makes it clear that no fee may be imposed against medical expenses.

Instead, this language does two things, and those two things are inextricably connected. First, the statute obliges the employer to pay medical expenses, directing said payment to the appropriate party. If the employee paid the bills, he or she is entitled to reimbursement. If the bill remains unpaid, payment is to be made to the medical provider. Only after establishing this dual obligation does the statute speak of a fee obligation, indicating that the magistrate "may prorate attorney fees at the contingent fee paid by the employee." These two sentences should be construed together, with the first establishing those entitled to payments, and the second assessing a fee upon the recipients of those payments.

The only way to interpret this language consistently, so as to give effect to all words used, is to prorate the fee payable on medical expenses between the parties receiving those expenses, either plaintiff or the provider. To the extent that the plaintiff is reimbursed, he or she pays his portion of the fee. To the extent that the provider is paid, it pays its portion. There is a reason the Legislature put the two sentences together.

Furthermore, the WCAC's interpretation ignores the word "prorate" in the statute. "Prorate" means "to divide, distribute, or assess proportionately." Merriam-Webster's Collegiate Dictionary (11th Ed, 2003). If the entire fee is to be paid by one party, where is

the division, distribution, or assessment? The WCAC's interpretation makes no sense, given the language of the statute.[1] Since issues of statutory construction may be considered *de novo* by this Court, DiBenedetto v West Shore Hospital, 641 Mich 394; 605 NW2d 300 (2000), this Court should reverse the award of attorney fees against defendant.

Defendant is aware that plaintiffs have contended that this issue was not preserved below. However, as noted in the footnote below, the WCAC has consistently held that, regardless of its feelings concerning the appropriate construction of the statutory language, it lacked the authority to disregard Court of Appeals opinions finding otherwise. As a result, there was simply no point in raising the issue before the WCAC, as it lacked the authority to accept defendant's argument.

Furthermore, "The general rule that a question may not be raised for the first time on appeal to this court is not inflexible. When consideration of a claim sought to be raised is necessary to a proper determination of a case, such rule will not be applied." Dation v Ford Motor Co, 314 Mich 152, 160-161; 22 NW2d 252 (1946). In that regard, this Court has written:

> "This Court has made it clear that in the usual case an issue not properly raised or objected to at trial is not to be considered on appeal. The procedural justification for this rule is to provide the appellate courts with a sufficient record upon which to resolve the issue in a fair manner." Swartz v Dow Chemical Co, 414 Mich 433, 446; 326 NW2d 804 (1982).

This reasoning is particularly applicable here. There has been no suggestion by either plaintiff or intervening plaintiff that the record in this matter is insufficient to permit a fair

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[1]In point of fact, even while acknowledging that it was bound by such decisions of the Court of Appeals as Boyce v Grand Rapids Paving, 117 Mich App 546; 324 NW2d 28 (1982); Watkins v Chrysler Corp, 167 Mich App 122; 421 NW2d 597 (1988); Nezdropa v Wayne County, 152 Mich App 451; 394 NW2d 440 (1986), various members of the WCAC frequently noted their own belief that the statute provided for no assessment of a fee against the employer. See, *e.g.*, Stankovic v Kasle Steel Corp, 2000 ACO #124 (concurrence of Commissioner Leslie); Gronley v St Clair Fiberglass, Inc, 2001 ACO #298; Bozzi v Efficient Engineering Co, Inc, 2003 ACO #120; Sidz v Sisters of the Order of St Dominic, 2003 ACO #125; Shattuck v Gencorp Automotive, Inc, 2004 ACO #113.

resolution of this issue, and it is obviously clearly within the scope of the Court's review powers.

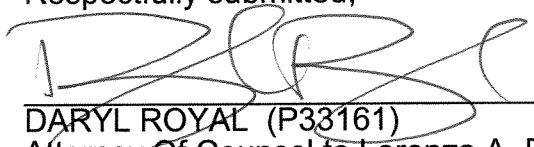
In fact, this same issue is also before the Court in another case in which it has directed oral argument on an application for leave to appeal. Donoho v Wal-Mart Stores, Inc, Supreme Court Order Dated July 1, 2005 (Docket No. 127537). The Court's order in that matter incorporated this language: "The parties shall include among the issues to be addressed at oral argument the correct interpretation of MCL 418.315(1)." Consequently, the Court will be considering this issue anyway, and fairness dictates that the parties to this case be bound by the same rule as those in Donoho and any other cases which may arise.

If the entire award is not reversed in this matter, the attorney fee order at the least should be reversed.

RELIEF

WHEREFORE Defendants-Appellants AUTO LAB DIAGNOSTICS & TUNE UP CENTERS and FARMERS INSURANCE EXCHANGE respectfully request that this Honorable Supreme Court either grant their application for leave to appeal or simply peremptorily reverse either the entire award or, at the very least, the award of attorney fees against defendants. Defendants further request any other relief to which they may be entitled.

Respectfully submitted,



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